



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** Department of the Army; Wilcox Electric, Inc.--  
Request for Reconsideration

**File:** B-232693.2, B-232693.3

**Date:** July 26, 1989

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### DIGEST

General Accounting Office affirms prior decision sustaining protest on ground that agency unreasonably evaluated proposals, and recommending that agency reevaluate proposals and reimburse protester for cost of pursuing protest; request for reconsideration does not warrant reversal where it is based on information that could have been but was not presented during consideration of original protest.

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### DECISION

The Department of the Army and Wilcox Electric, Inc., request reconsideration of our decision, Plessy Electronic Systems, Inc., B-232693, Feb. 2, 1989, 89-1 CPD ¶ 107, in which we sustained Plessy's protest against the award of a contract to Wilcox under request for proposals (RFP) No. DAAB07-88-R-M011. We affirm our prior decision.

Our decision involved a solicitation for radar systems which required that the offered system possess a mean time between failure (MTBF) of not less than 3,000 hours. Wilcox stated in its proposal that its offered magnetron radar system, with a predicted MTBF of 4,486 hours, easily complied with this requirement and submitted two types of information in support of this claim: (1) actual data on 128 systems it had installed worldwide; and (2) partial calculations derived from Military Handbook (MIL-HDBK) 217E (which prescribes a method for calculating the reliability of magnetron radar systems). The Army determined that this information established Wilcox's compliance with the MTBF requirement.

We concluded in our decision, however, that the Army's determination was unreasonable because it in fact was not clear from the protest record that either of the two types of information submitted established compliance. First, we

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of information submitted established compliance. First, we found that since the system Wilcox offered here was different in material respects from those it had previously installed, and that the Army did not establish that the data from those systems nevertheless was valid for MTBF comparison purposes, the data did not provide a sufficient basis for determining compliance with the MTBF requirement. Second, we found that the Army's determination that Wilcox's calculations supported Wilcox's claims of a predicted MTBF of 4,486 was predicated upon an erroneous assumption regarding Wilcox's intended replacement schedule for the key component (the magnetron tubes) of its offered system. We therefore sustained Plessy's protest and recommended that the Army recalculate Wilcox's system MTBF and take corrective action if otherwise appropriate. We also found that Plessy was entitled to be reimbursed its protest costs, including reasonable attorneys' fees.

The Army has advised our Office that in accordance with our decision it recalculated Wilcox's system MTBF and found that Wilcox met and indeed exceeded the RFP requirements. Plessy has not challenged the validity of this recalculation <sup>1/</sup>, and we have no other basis to question the new determination that Wilcox's system meets the MTBF requirement; there thus is no impediment to the continued performance of Wilcox's contract.

The Army nevertheless seeks reconsideration of our initial decision on the basis that its original determination of Wilcox's compliance with the MTBF requirement was proper, and asks that the award of protest costs to Plessy be overturned.

In support of its request, the Army has submitted the opinion of a technical expert it obtained after the issuance of our decision, which it states confirms that, contrary to our prior decision, the MTBF of Wilcox's offered system in fact reasonably could be deduced from the historical data compiled on Wilcox's installed systems. Additionally, the Army contends that our determination that the MTBF calcula-

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<sup>1/</sup>Plessy's response to the Army's reconsideration request does suggest that the firm is questioning the recalculation, but this position is based on Plessy's apparent misunderstanding that the recalculation was based on a reevaluation of the two types of information on which the original determination was based. In fact, the recalculation was based on new information regarding magnetron reliability. Plessy does not raise any argument concerning this new information.

tions furnished by Wilcox were inconclusive was based on our misunderstanding of statements made by Wilcox and agency personnel in the protest documents and at the conference on the matter. The Army argues that Wilcox's MTBF calculations established its offered system's compliance with the MTBF requirement irrespective of its intended replacement schedule of the magnetron tubes; our finding that agency personnel made erroneous assumptions as to Wilcox's intended replacement schedule, the Army maintains, thus did not affect the correctness of the Army's determination that Wilcox's system met the MTBF requirement.

While the Army would have us believe that its reconsideration request contains nothing more than clarification or amplification of positions previously presented, we view this additional information as new, independent support of Wilcox's compliance with the MTBF requirement which could have and should have been furnished with the agency's initial response to Plessy's protest, or, at the latest, at the conference held on this matter. In this regard, we note that the Army, in responding to Plessy's initial protest, did not, as it did in its reconsideration request, provide any information, such as the opinion of technical experts, establishing that the historical data furnished by Wilcox validly reflected the performance potential of the equipment Wilcox intended to supply for purposes of this procurement. Additionally, as noted in our prior decision, the Army, in responding to Plessy's initial protest, repeatedly represented that Wilcox's intended replacement schedule was a determinative factor in its conclusion that Wilcox's calculations established its system's compliance with the MTBF requirement. Now, the Army seems to have abandoned this position and instead maintains that Wilcox's replacement schedule in fact had no bearing on this conclusion. Because this information was not timely presented, it is not now a basis for reconsidering our prior decision that the Army did not adequately support its determination that Wilcox's offered product indeed would satisfy the government's minimum needs. See Dept. of the Navy--Request for Recon., B-220991.2, Dec. 30, 1985, 85-2 CPD ¶ 728 (a prior decision will not be reconsidered where an agency bases its reconsideration request on information it could have, but did not present during our initial consideration of the protest).

The Army alternatively argues that Plessy should not be awarded protest costs because Wilcox's system was ultimately found to comply with the MTBF requirement and Wilcox thus was entitled to the contract award. However, we do not view the fact that the Army ultimately reasonably determined that the award to Wilcox was proper to be determinative of the

firm's entitlement to reimbursement of its costs. The deficiency we found was that the Army's initial evaluation of Wilcox's proposal was unreasonable, and this impropriety was only corrected in response to our decision sustaining the protest, and only after Plessy was required to pursue the matter to its conclusion. The Army could have obviated the need for Plessy to incur the costs of continuing to pursue the matter by properly considering Wilcox's compliance with the MTBF requirement at some early stage of the protest, and then presenting evidence supporting its conclusion (as it has done in this reconsideration request). Because the Army did not take the affirmative steps necessary to resolve this matter at an earlier date, it remains our position that Plessy is entitled to be reimbursed its protest costs, including attorneys' fees.

Wilcox also argues that our decision was based on erroneous assumptions regarding the Army's evaluation of its proposal. As Wilcox was found to be entitled to the award based on the Army's review of the evaluation in response to our decision, however, no useful purpose would be served by our consideration of these arguments. See Global Diesel Systems, Inc., B-229508.2, May 31, 1988, 88-1 CPD ¶ 509.

As there has been no showing that our prior decision was based on errors of fact or law, we affirm our prior decision.



Acting Comptroller General  
of the United States